No. 16-1466

IN THE

# Supreme Court of the United States

MARK JANUS,

*Petitioner,*

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF LOS ANGELES COUNTY'S DEPARTMENT OF HEALTH SERVICES, NYC HEALTH + HOSPITALS, AND SERVICE EMPLOYEES INTERNATIONAL UNION AS AMICI CURIAE SUPPORTING RESPONDENTS


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## INTERESTS OF AMICI CURIAE

Los Angeles County's Department of Health Services ("LA DHS") is the second largest municipal health system in the country, serving approximately 600,000 patients every year. LA DHS relies on cooperative work with its unionized employees to improve quality and efficiency, and its union partnerships have already, among other things, succeeded in reducing patient wait times, increasing productivity, and increasing patient satisfaction. LA DHS joins this brief because it believes the fair share provisions in its collective bargaining agreements play an important role in fostering productive labor relations, which benefit the health system, its patients, and its employees alike.[1]

NYC Health + Hospitals ("NYC H+H") is the largest municipal healthcare system in the country, serving 1.2 million patients every year. Like many other public and private health systems, NYC Health + Hospitals uses labor-management partnership structures to improve care quality and efficiency. Through partnership work, the healthcare system and its employees have already, among other achievements, reduced needle stick rates and reduced readmission rates for pediatric asthma patients. NYC Health + Hospitals joins this brief because it believes the fair share provisions in its collective bargaining agree-

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief. The parties' letters consenting to amici briefs are on file with the Clerk.

ments are important to the continued success of its labor-management cooperative work.

The Service Employees International Union ("SEIU") is the largest healthcare union in the United States. More than half of SEIU's two million members work in the healthcare industry. Like its co-amici, SEIU believes fair share fees are important to its successful and mutually beneficial collective bargaining relationships.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The principal lesson of this Court's public employee speech cases is that public employers have "wide discretion" to manage their operations in order to achieve productivity and efficiency goals. *Connick v. Myers*, 461 U.S. 138, 151 (1983). Public employers operate well within that broad discretion when they borrow management systems validated in the private sector, *see, e.g., Waters v. Churchill*, 511 U.S. 661, 676 (1994), and individuals who choose to work for the government know that they, like private-sector employees, must accept certain restrictions on their freedom, *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

One question all public and private employers face when exercising their managerial discretion is how best to structure labor relations. History reveals a wide variety of employer experiences in this area, ranging from catastrophic antagonism between management and front-line staff to high performance workplaces that maximize employee contributions. Management experts familiar with this history describe a labor relations continuum for both union

and non-union environments, with adversarial labor-management relations at one end and high performance relationships at the other. Steps toward the high performance end of the continuum are associated with productivity and efficiency gains as employers benefit from lower turnover, increased workforce engagement, and employee contributions to process improvements.

Data gathered over many years from employers at all points along the continuum demonstrate, inter alia, that collective bargaining *if managed well* can contribute to positive labor relations and help employers achieve their goals. Disruption and acrimony can be avoided, and mature collective bargaining relationships can promote quality, efficiency, and productivity. Many healthcare employers in particular have benefitted from partnerships with their employees' unions, and workplaces with collective bargaining have been shown in some circumstances to outperform their non-union counterparts.

Given that significant evidence shows unionized environments can be productive, it is completely rational for public employers (especially those operating in markets where unions are well-established and popular) to implement best practices for making collective bargaining successful, and allowing unions to collect fair share fees is one policy that has been shown over many years to encourage productive collective bargaining. Fair share fees ensure that employee unions are sufficiently secure in their position to focus on the workforce's long-term interests, including by cooperating with management on initiatives for mutual benefit, rather than on maintaining a

contentious campaign atmosphere to encourage membership and secure financial stability. Fair share fees also provide adequate resources so that employee unions can be effective, and that effectiveness in turn gives them enough credibility with the workforce to "vouch for" employer systems and initiatives. Fair share fees reduce resentment among coworkers as well, allowing employers to reap benefits from multi-disciplinary teamwork and workforce cohesion.

The fee-supported collective bargaining relationships between SEIU and LA DHS and NYC H+H show how this can work. Following a labor relations model developed in the private sector, LA DHS has consciously sought to partner with its employees' unions and to use their strength to support system-wide improvements. Unions like SEIU Local 721 contribute resources and staff time to quality improvement programs conducted with management, and vouch for those programs with front-line workers, encouraging them to participate wholeheartedly in employer-initiated projects. In New York the same process is under way, with public hospitals and SEIU unions engaged in a variety of cooperative projects aimed at improving patient care quality.

These labor-management cooperative efforts have produced meaningful, measurable benefits for patients, and amici believe their cooperative work thrives in significant part because it involves effective, well-resourced unions incentivized to focus on long-term interests rather than short-term campaigning. Amici urge the Court to affirm the Seventh Circuit's decision so that their successful collective bar-

gaining relationships can continue to improve productivity, efficiency, and patient care.

## ARGUMENT

### I. Public Employers in Pro-Union Environments Must Have Discretion to Adopt Policies That Make Collective Bargaining Productive.

#### A. Public Employers Have Significant Discretion under the First Amendment to Manage Their Employees' Speech.

The guiding principle embodied in this Court's public employee speech cases is that the government as employer has "wide discretion" with respect to personnel management, *Connick*, 461 U.S. at 151, including discretion to implement best practices following private-sector models, *see, e.g.*, *Waters*, 511 U.S. at 676. Individuals who choose to enter into government service buy into this bargain, knowing they must "accept certain limitations on [their] freedom." *Garcetti*, 547 U.S. at 418; *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977). Petitioner, for example, opted into his position in a state where fair share fees had already been the public-sector norm for more than twenty years. *See* Movant Er..ployees' Br. in Support of Mot. to Intervene Ex. B ¶2, *Rauner v. AFSCME Council 31*, No. 15-1235 (N.D. Ill. Mar. 23, 2015), ECF No. 92-5; 5 Ill. Comp. Stat. 315/6(e) (1983).

The decisional framework familiar from *Connick* and similar cases reflects the distinction between government acting as employer vis-à-vis its employ-

ees and government acting as sovereign vis-à-vis its citizenry, and recognizes the importance of public employer discretion in the former context. Public employees have no protected speech interests unless they speak as citizens on matters of public concern, and, even when they do, their First Amendment interests must be balanced against competing employer considerations. *See, e.g.*, *Connick*, 461 U.S. at 150. For purposes of this balancing, public employers' assessments of their own managerial interests are entitled to "[d]eference" if "reasonable." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996).

To date, this Court has recognized as reasonable a number of employer interests relevant to fair share fees, including interests in promoting effectiveness and efficiency, *see, e.g.*, *Connick*, 461 U.S. at 150, ensuring "harmony among co-workers," and fostering "personal loyalty and confidence" in the workplace, *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). The *Abood* Court invoked several of these interests when it balanced employees' rights against employers' prerogative with respect to fees. 431 U.S. at 220–21, 222–25. Illinois also cited several when it enacted its labor relations law, *see* 5 Ill. Comp. Stat. 315/2 (1983), and certainly nothing in this case's effectively nonexistent record has proved the state's assessment of its interests to be unreasonable or outside its broad discretion.

Petitioner and his amici contend that these principles may be ignored after *Harris v. Quinn*, 134 S. Ct. 2618 (2014), but *Harris* does not stand for that radical proposition. In *Harris*, this Court declined to extend the public employee speech doctrine to cover

"personal assistants" as to whom "the State [was] not acting in a traditional employer role." *Id.* at 2642. Here, by contrast, Illinois is indisputably acting as employer, which means this case implicates the state's authority over its own workplaces and full-fledged employees. *Harris*'s conclusion that the personal assistants would have prevailed under a public employee speech analysis also rested on features unique to the in-home care system, in which the state largely refrained from exercising day-to-day control over assistants working in private homes at individual employers' direction. *See id.* at 2640–41. Given the state's limited exercise of authority and the assistants' supervision by individual non-state employers, the Court had no cause to consider the ways that fair share fee systems facilitate productive collective bargaining relationships in ordinary public-sector workplaces—relationships both important to effective public administration and difficult to maintain with insecure collective bargaining agents. Thus, *Harris* is not controlling.

### B. Unions Can Help Employers Improve Productivity, Efficiency, and Quality.

Petitioner and his amici would have the Court believe that for employers interested in exercising their wide discretion to achieve positive labor relations, the only good union is a weak or non-existent one. *See* Pet. Br. 60–61. But that opinion rests on ideology, not fact. In reality, decades of empirical research shows that well-managed collective bargaining relationships can improve labor relations and help employers achieve productivity and efficiency goals.

### 1. Many employers invest in improved labor relations to achieve productivity and efficiency gains.

Management experts often describe labor relations as falling along a continuum, with adversarial employer-employee relations at one end and sustained cooperation between labor and management at the other. *See, e.g.*, Nat'l Acads. of Sci., Eng'g & Med., Transit Coop. Research Program, 2 *Labor-Management Partnerships for Public Transportation* A-5 (2015), *available at* https://www.nap.edu/catalog/23431/labor-management-partnerships-for-public-transportation-volume-2-final-report. The outcomes associated with different stages along the continuum and the workplace practices that tend to improve labor relations have been the subject of extensive study since at least the early 20th century. *See* Herman Aguinis et al., *Using Organizational Science Research to Address U.S. Federal Agencies' Management & Labor Needs*, 2 Behav. Sci. & Pol'y 66, 68 (2016) ("Research in this field, conducted over the past 100 years, has involved millions of people across industries and occupations, resulted in studies published in hundreds of scientific journals and yielded a mother lode of empirical evidence that is now widely accepted."). As that evidence reflects, many public and private employers have found that investing in improved labor relations makes sense because, in their industries or regions, the productivity and efficiency gains that result from positive steps along the labor relations continuum outweigh any associated costs.

At one end of the continuum are antagonistic environments, which can be union or non-union and

which tend to be characterized by distrust, emphasis on rule enforcement, conflict among front-line workers, and conflict between workers and management. Morale and employee engagement tend to be low and employees unwilling to invest in firm-specific skills. Employees in such environments also tend to believe that any ideas they have for improvement will either be ignored or lead to retaliation. *See* Thomas A. Kochan et al., *Healing Together* 8, 48 (2009); Dianne S. Schwager, *Foreword* to Nat'l Acads. of Sci., Eng'g & Med., *supra*.

Many workplaces fall somewhere in the middle of the continuum, with labor relations characterized neither by deep-seated suspicion nor by a feeling among staff and management that they are consistently working together to achieve common goals. *See* Kochan et al., *supra*, at 48. These in-between environments often see episodic periods of labor-management cooperation, with typical joint projects including training programs and efforts to respond to urgent crises. *See id.* at 65; Daniel Marschall & Ellen Scully-Russ, *Joint Union-Management Workforce Development Model, in Transforming the U.S. Workforce Development System* 206, 215 (David Feingold et al. eds., 2010); Nat'l Acads. of Sci., Eng'g & Med., *supra*, at A-1. Employers able to move to the middle of the labor relations continuum can achieve significant gains through these projects, which tend to, inter alia, improve employee morale and retention and, by opening up lines of communication between labor and management, enable the development of innovative process improvements. *See, e.g.*, Sally Klingel & David B. Lipsky, *Joint Labor-Management Training Pro-*

*grams for Healthcare Worker Advancement and Retention* (2010), *available at* http://digital commons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1042&context=reports.[2]

Some employers who experience gains with joint projects are able to institutionalize labor-management cooperation and achieve "high performance" work environments. Jody Hoffer Gittell, *High Performance Healthcare: Using the Power of Relationships to Achieve Quality, Efficiency and Resilience* 49 (2009) [hereinafter Gittell, *Healthcare*]. In high performance environments, labor-management communication is a permanent feature of the workplace and discussions extend to employers' core operations. *See, e.g.*, Kochan et al., *supra*, at 55; Marschall & Scully-Russ, *supra*, at 206. Labor and management "work together, not in total harmony or under naïve notions that conflicts [will] magically disappear, but by surfacing and addressing issues, challenges, and conflicts as they arise . . . ." Kochan et al., *supra*, at 7. Management also uses the communicative structures in such environments to convey priorities and educate employ-

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[2] *See also* Dorothea De Schweinitz, *Labor and Management in a Common Enterprise* 47–48 (1949) (describing process improvements developed by labor-management committees during World War II); Paul Adler, *Time-and-Motion Regained*, Harv. Bus. Rev., Jan.-Feb. 1993, at 3; Peter Lazes & Tony Costanza, *Xerox Cuts Costs Without Layoffs Through Union-Management Cooperation* (1984), *available at* http://digital commons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1057&context=briefs (with Adler, describing efficiencies achieved by labor-management projects prompted by foreign competition in the 1970s and 1980s).

ees about aspects of the enterprise beyond their specific roles, enabling better coordination across job categories. *See, e.g.*, Jody Hoffer Gittell, *The Southwest Airlines Way: Using the Power of Relationships to Achieve High Performance* 32 (2003) [hereinafter Gittell, *Southwest*].

Research shows that employers who succeed in taking positive steps along the labor relations continuum—whether to the middle or all the way to "high performance"—experience benefits "across a broad range of outcomes," including improved quality, workforce productivity, and financial performance. Gittell, *Healthcare*, *supra*, at 49–50 & n.66 (citing studies); *see also, e.g.*, Aguinis et al., *supra*, at 68–70. As an initial matter, such employers avoid or minimize the costs imposed by adversarial labor relations, which include "animosity" and "poor communication," Schwager, *supra*, as well as "burnout, litigation, lost work hours, [and] employee turnover," Lucian Leape Inst., *Through the Eyes of the Workforce: Creating Joy, Meaning, and Safer Healthcare* ES1–ES2 (2013). Front-line employees' sense of having a "voice" on the job also works to improve morale and engagement, which "results in better job performance." Aguinis et al., *supra*, at 68; *see also* Ariel C. Avgar et al., *Labor-Management Partnership and Employee Voice: Evidence from the Healthcare Setting*, 55 Indus. Rel. 576, 580 (2016). Increased communication between management and front-line staff can also encourage workers to provide information about day-to-day operations that they would otherwise have no forum in which to share. *See* Kochan et al., *supra*, at 53.

### 2. Unions can help employers improve labor relations and achieve productivity and efficiency gains.

Research shows that unionized environments, like non-union ones, can move positively along the labor relations continuum and that unionization can actually help employers improve labor relations and maximize resulting gains—*if* employers implement policies to make collective bargaining productive. This research demonstrating that collective bargaining can generate employer benefits confirms the views held by the original drafters of our labor laws, who talked of "labor peace" not only as the avoidance of strikes but also as productive, cooperative engagement between labor and management.

As Harvard economists Richard Freeman and James Medoff have explained, the fact of unionization (or non-unionization) alone does not determine whether an employer has antagonistic or productive labor relations. *See* Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 12 (1984). What matters more are the "policies and actions" implemented by management in response to their employees' choices. *Id.*; *see also id.* at 164–65. If management deploys strategies aimed at making engagements with its collective-bargaining partner productive, then management can use collective bargaining "to learn about and improve the operation of the workplace." *Id.* at 12. Unionism can in this way and others be "a significant plus," enabling employers to maximize gains from improved labor relations and exceed outcomes achieved in non-

union workplaces that try to implement similar practices. *Id.*

Kaiser Permanente provides a good example of employer choices that have made unionization productive. In the late 1980s and early 1990s, Kaiser experienced a financial crisis and responded initially with layoffs and by insisting on union concessions. *See* Kochan et al., *supra*, at 34. When those measures did not sufficiently reduce costs, and instead resulted in a "demoralized workforce" and declining standards of care, *id.* at 34–35, the company and its employees' unions made a "pragmatic judgment that [they] would have more to lose . . . by going further down the path of escalating conflict." *Id.* at 38. They developed a new partnership approach that is now institutionalized at the highest levels of company and union leadership, *see, e.g.*, *id.* at 48, and on the front lines in joint labor-management "unit-based teams" (UBTs), which meet regularly to identify specific improvement goals and develop projects to achieve them. *See Labor-Management Partnership Fact Sheet*, https://www.lmpartnership.org/sites/default/files/lmp_factsheet_6-17.pdf (last visited Jan. 10, 2018). Twenty years after the partnership was formed, Kaiser credits it with long-term improvements in clinical and business outcomes. *See id.* (citing UBT achievements including 60% fewer patient falls with injuries, 13% improvement in patients' overall satisfaction, etc.).

Numerous studies show that other unionized workplaces can, like Kaiser, achieve productive labor relations and performance outcomes that exceed those at non-union firms. One study of 841

manufacturers, for example, found that unionized firms with employee participation programs measured 34.8% more performance improvement than non-union firms using similar programs. William N. Cooke, *Employee-Participation Programs, Group-Based Incentives, and Company Performance: A Union-Nonunion Comparison*, 47 Indus. & Lab. Rel. Rev. 594 (1994). The study's author concluded that "unionized firms, on average, provide a much better environment for tapping the benefits of employee participation programs than do nonunion firms." *Id.* at 607; *see also* Maryellen R. Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation, in Unions and Economic Competitiveness* 267 (Lawrence Mishel & Paula B. Voos eds., 1992) (finding that non-union plants utilizing employee participation programs had 33.1% longer production time per unit than union firms with similar programs).

Evidence of collective bargaining's potential benefits is particularly strong in healthcare, where maintaining employee morale, enhancing skills, and reducing employee turnover may be of life and death importance. Studies have found higher productivity and higher wages in union versus non-union hospitals, with productivity gains more than offsetting higher pay. Michael Ash & Jean Ann Seago, *The Effect of Registered Nurses' Unions on Heart-Attack Mortality*, 57 Indus. & Lab. Relations Rev. 422, 424 (2004). Hospitals with nurse unions have lower turnover, and there is also a highly statistically significant association between the "presence of an R.N. union and lower risk-adjusted heart-attack mortality." *Id.* at 432.

A recent study in California found that hospitals with successful unionization elections significantly outperformed hospitals where the union lost with respect to the incidence of hospital-acquired illnesses, with particularly large impacts on "central nervous system complications . . . [and] metabolic derangement." Arindrajit Dube et al., *Nurse Unions & Patient Outcomes*, 69 ILR Rev. 803, 830 (2016). Controlling for other factors, unionizing hospitals also performed better relative to a broad sample of control hospitals (i.e., not just those with recent union elections), and the benefits of unionization grew over time. *Id.* at 812, 820. The study's authors found these data "likely to represent a causal effect of unionization on the quality of care" rather than a causal effect of changes in reporting or other factors. *Id.* at 830.

Researchers believe that collective bargaining works in several ways to generate these benefits. Most immediately, unionization often improves wages and morale and lowers turnover and training costs. *See* Freeman & Medoff, *supra*, at 46–47, 95. Unions provide protection against retaliatory job loss as well, which encourages frank employee participation in quality improvement programs. Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation*, *in* Mishel & Voos, *supra*, at 173, 193–94. Employees feel free to point out "improvements that perhaps should have been obvious to management but were not, and that, once discovered can be installed with a net gain to the company as well as the workers." Freeman & Medoff, *supra*, at 15 (internal quotation marks omitted). In the absence

of union protection, this "expression of [employee] voice" often feels too "risky" for front-line staff who "fear the employer may fire them" if they make suggestions that anger supervisors, *id.* at 9, or they may "work[] their way out of a job" by identifying opportunities for productivity improvements, Kochan et al., *supra*, at 53.

Employee participation programs also have "greater legitimacy in the eyes of workers" when independent collective-bargaining representatives are involved. Eaton & Voos, *supra*, at 193. Management leaders at Swedish Hospital in Seattle, for example, described labor participation in a joint program as an advantage because the union's involvement "create[d] a sense of trust and support" among the workforce, making employees less likely to question the employer's motives. Klingel & Lipsky, *supra*, at 50; *id.* at 4 (explaining that union involvement "eases workers' fears" and reassures them that "skill and aptitude assessments, counseling, and test scores will not put their jobs . . . at risk"). Furthermore, the presence of unions can have a "sunshine" effect on lower-level supervisors, shining a light on counter-productive management practices that higher-ranking officials might not otherwise discover. *See* Freeman & Medoff, *supra*, at 15, 174.

Finally, economists point out that many important aspects of the industrial setting (e.g., safety conditions, employee benefits) are "public goods," i.e., goods that will affect the well-being of every employee, and that competitive markets do not produce enough of such goods "without some form of collective decision-making," such as that provided by

unionization and collective bargaining. *Id.* at 8, 9. Many managers credit their employees' unions with the initial idea to consider cooperative strategies as well. *See, e.g.*, Thomas A. Kochan, *The Kaiser Permanente Labor Management Partnership 2009-2013*, at 8 (2013) [hereinafter Kochan, *Kaiser 2009-2013*], *available at* http://mitsloan.mit.edu/uploadedFilesV9/Academic_Groups/Work_and_Organization_Studies/Media/FINAL-KPreport130947.pdf (quoting management interviewee about partnership: "Perhaps we could have done this without unions but for fifty years we didn't. The union leadership brought sharper focus to this as a way of doing work.").

These positive results of collective bargaining would come as no surprise to the original drafters of our labor laws, who articulated a broad concept of labor peace in which collective bargaining not only avoids strikes but also leads to meaningful cooperation between labor and management. Senator Robert Wagner, the sponsor and champion of the National Labor Relations Act, held a "profoundly . . . cooperationist" view of collective bargaining, Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1379, 1427 (1993), and believed it could enable "the highest degree of cooperation" between labor and management, Sen. Robert F. Wagner, *Company Unions: A Vast Industrial Issue*, N.Y. Times, Mar. 11, 1934. Others shared his view, describing "cooperation between . . . management and the contracting union" as "the mature fruit of collective bargaining" capable of producing "savings in costs, economies in operations and enlargement

of markets." Nat'l Bur. of Econ. Affairs, Inc., *Collective Bargaining Contracts* 547–58 (1941).

Employers across industries have for years invested significant resources in partnership programs with their employees' unions, similarly believing that collective bargaining can be channeled into a productive force. *See, e.g.*, Peter Lazes et al., *How Labor Management Partnerships Improve Patient Care, Cost Control and Labor Relations* (2012), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1058&context=reports (describing labor-management cooperative programs). Before "company unions" were prohibited, some employers even went so far as to create labor organizations where none existed, and where no union organizing drives were feared, in an effort to improve morale and cooperation. *See* Daniel Nelson, *The Company Union Movement 1900-1937: A Reexamination*, 56 Bus. Hist. Rev. 335 (1982) (discussing, inter alia, the Filene Cooperative Association formed by a Boston department store in 1898 to improve workforce morale, even though "there was no union and no threat of one"); *see also* Alexander H. Heron, *Collective Bargaining in Action in Collective Bargaining Contracts* 21 (1941).

As these employers understood, moving from adversarial toward cooperative labor relations can improve morale, efficiency, and productivity, and while unionization may neither be necessary to achieve those gains nor always produce them, unionization is certainly *compatible* with cooperative labor relations and has in some cases generated better results than found in non-union environments.

### C. Many Public Employers Operate in Pro-Union Environments Where Strategies Aimed at Channeling Collective-Bargaining Institutions into Productive Relationships Make Sense.

In some states, especially those with little union history, public employers may decide that their best strategy for achieving productivity gains like those described in the previous sections is to try to remain union free. But in other jurisdictions, especially those where support for unionization runs deep, many public employers have seen that policies aimed at weakening their employees' unions can carry high costs and have instead reasonably sought to achieve gains by implementing policies aimed at making collective bargaining productive.

South Carolina provides a good example of a state with little union history where public employers may be inclined toward strategies intended to avoid unionization. South Carolina has had a "right to work" law on the books for more than sixty years, and public employees have no right to engage in collective bargaining. *See Branch v. City of Myrtle Beach*, 532 S.E.2d 289 (2000). The state's union-inhospitable legal regime and cultural opposition to unions have consistently kept union density very low. *See* Bureau of Labor Statistics, Union Affiliation of Employed Wage and Salary Workers by State, https://www.bls.gov/news.release/union2.t05.htm [hereinafter BLS Union Affiliation Table].

In many other states, however, the situation is very different. New York's labor history, for example, dates back at least to 1794 when printers formed the

state's first documented union, followed soon after by others. Selig Perlman, *A History of Trade Unionism in the United States* 4–7 (1922); *see also id.* at 19–20 (by 1836 there were fifty-two unions reported in New York, including a female union association). Public employees were part of the state's labor movement early on: A national union federation formed in New York in 1834 made "secur[ing] the ten-hour day for government employees" an early goal, *id.* at 26, and in 1836, mechanics employed in the New York and Brooklyn Navy Yards campaigned successfully for a ten-hour day implemented by President Jackson, *id.* at 26–27.

Today, nearly two centuries later, New York has among the highest union density rates in the nation, with more than one-quarter of workers represented by unions. BLS Union Affiliation Table, *supra*. Other states with similar cultures and histories also have high unionization rates, *see id.*, and recent surveys show that unions are becoming more popular, not less, *see* Jeff Jones & Lydia Saad, *Gallup Poll Social Series: Work & Educ.* (Aug. 2–6, 2017), http://news.gallup.com/poll/217331/labor-union-approval-best-2003.aspx.

In states that have high union density rates overall, certain industries tend to be more unionized than others. In recent years, for example, nurses have organized at higher rates than employees in other industries. *See* Kochan et al., *supra*, at 12. In the San Francisco Bay Area, union density in hospitals was estimated in 2004 to be between 65% and 95%. Ash & Seago, *supra*, at 439. There is also a long union history in healthcare: A union was first

recognized by Los Angeles public hospitals in 1969, and interns and residents organized in New York public hospitals in 1957, *Our History*, CIR SEIU (Dec. 22, 2017), http://www.cirseiu.org/our-history-2/. In areas and industries like these with strong union traditions, employers that do not offer union benefits can find it difficult to compete for staff—a particular concern in healthcare where persistent workforce shortages make attracting well-trained employees and reducing turnover key employer priorities.

When deciding on labor relations policies, public employers in states with strong pro-union cultures must also weigh the fact that past efforts to weaken unions have been costly. New York, for example, saw a wave of strikes in the years after World War II as public employees sought recognition and collective bargaining rights. State and city officials responded first with a hardline anti-union position, *see* Robert H. Platt, *Comparison of Impasse Procedures: The New York City Collective Bargaining Law and the New York State Taylor Law*, 9 Fordham Urb. L.J. 1039, 1041 (1981), but that approach only worsened the problem, which continued for years until culminating in a transit workers' strike, *see* Owen Moritz, *Shutdown: John Lindsay, Michael Quill, and the NYC transit strike of 1966*, N.Y. Daily News (Aug. 14, 2017). That strike, and others of the era, prompted New York to pass the Taylor Act, which extended bargaining rights to public employees, authorized fair share fees, and inaugurated a new era of labor peace. *See* Br. of New York City Mun. Labor Comm. at 11, *Friedrichs v. Cal. Teachers Ass'n*, 578 U.S. __ (No. 14-915) (2016); *see also* Br. for the States of New

York et al. at 14–20 & nn. 7–10, *Friedrichs*, *supra* (citing examples from other states).

Public employers in these pro-union environments face a "razor-edge choice," Kochan et al., *supra*, at 235: risk disruption and a "foundation of low trust" by adopting policies aimed at weakening their employees' chosen representatives, or adopt policies aimed at channeling employees' preferences for collective bargaining into stable, productive, and cooperative labor-management relationships, *id.*

* * * * *

In sum, different public employers face very different labor relations environments that lead them to make different policy choices. For employers operating in states and industries where unions are well-established, efforts to de-stabilize popular unions may carry significant costs. At the same time, a raft of data gathered over many years shows that collective bargaining relationships *if managed well* can produce significant gains. Given these risks and potential benefits, it is completely rational and well within their "wide discretion," *Connick*, 461 U.S. at 151, for public employers operating in pro-union environments to adopt policies aimed at making collective bargaining productive.

## II. Many Reasonable Public Employers Have Followed Private-Sector Models by Seeking to Partner with Their Employees' Unions, and Fair Share Fees Are Critical to the Success of Their Partnerships.

For public employers operating in pro-union environments, productive collective bargaining relation-

ships are possible but by no means inevitable. They require trust, time, and resources, and a workforce convinced that partnership is in its interest. Fair share fees help employers achieve each of these conditions and, as a result, make productive collective bargaining much more likely. Simply put, "secure" unions supported by fair share fees are much better able to "cooperate with management and play a constructive role in the operation of [an] enterprise" than weak unions struggling to survive and incentivized to emphasize conflict with management. Lloyd G. Reynolds, *Labor Economics and Labor Relations* 444 (8th ed. 1982).

### A. Fair Share Fees Foster Trust Between Labor and Management and Among Co-Workers.

Productive labor relations depend on "the ability of labor and management to reconfigure their relationship from adversarial to collaborative." Avgar et al., *supra*, at 582; *see also* Eileen Appelbaum & Larry W. Hunter, *Union Participation in Strategic Decisions of Corporations, in Emerging Labor Market Institutions for the Twenty-First Century* 288 (Richard B. Freeman et al. eds., 2004) ("the less cooperative the relationship between labor and management," the less likely the parties will "be able to discover or realize joint gains"). That reconfiguration, in turn, requires trust and a significant "leap of faith"—faith that each side can be trusted to do what it promises, and faith that each side is looking to achieve *mutual* gains, not to undermine the other in the guise of partnership. Avgar et al., *supra*, at 587. Labor and management representatives who have

made that leap emphasize the importance of an "honest and frank relationship, built up over time" and of operating "on the basis of mutual respect and never on blindsiding or diminishing the other party." Nat'l Acads. of Sci., Eng'g & Med., *supra*, at G-9, G-10.

Of course, achieving an "honest and frank" relationship can be easier said than done. "Labor relations have typically been adversarial in the United States," *id.* at A-1, and "hostilities and distrust built up over the years" can be difficult to set aside, Kochan et al., *supra*, at 71. One union member at Kaiser, for example, described himself as "suspicious" of cooperation with management because there had "been a lot of doublespeak from Kaiser" over the years and partnership could be "more of the same." *Id.* at 39–40. A management representative who eventually became a partnership supporter was similarly suspicious to start because "before this experience [he] only associated unions with people on picket lines," not with anything productive. *Id.* at 57.

Overcoming these attitudes is likely to be difficult for any employer and union interested in cooperation, but overcoming them becomes nearly impossible when a union is weak and insecure. A union constantly struggling to survive has a strong incentive to encourage "antagonism [against] the employer," not to become the employer's partner. Reynolds, *supra*, at 444. The union must prove its value to members and prospective members by emphasizing differences with management, making demands, and pursuing grievances. *See* Neil W. Chamberlain & Donald E. Cullen, *The Labor Sector* 173 (2d ed. 1971). Only when the "union's existence is secure can it afford to

cooperate with management and play a constructive role." Reynolds, *supra*, at 444–45.

Right-to-work environments tend to create insecure unions. Union members see that non-member co-workers can access all the benefits offered by the union for free. *See, e.g.*, Mancur Olson, *The Logic of Collective Action* 85–88 (1965). This applies a strong downward pressure on membership that only accelerates over time, as each employee who rescinds his or her membership increases the dues burden on those who remain. *See id.* at 35. Because of this classic free-rider problem, union membership in right-to-work environments often ends up well below even what the employees themselves want, *id.* at 36, 76–91, leaving unions that are actually supported by a majority of workers financially unstable. And financially unstable unions must campaign constantly for new members, devoting much of their energy to "keeping [their] fences mended against employer attack" and filing "enough grievances to keep the workers convinced that the . . . union is essential for their protection." Reynolds, *supra*, at 444; *see also* Email from Alyssa Cundari Roelans, Fl. Area Dir., Comm. of Interns & Residents (Nov. 30, 2017) [hereinafter Roelans Email] (on file with authors) ("Being in a RTW state is really like working on a new organizing campaign").

Fair share fees help solve this problem by providing unions with a sense of security. Eliminating "the issue of union status" by ensuring that the union can collect from those who receive its services reduces any incentive to emphasize conflict with management and allows union leaders to move from

campaigning toward a productive relationship. Sumner H. Slichter, *The Changing Character of American Industrial Relations*, Am. Econ. Rev., Supplement, Mar. 1939, *reprinted in Potentials of the American Economy: Selected Essays of Sumner H. Slichter* 217 (John T. Dunlop ed., 1961). "[I]nstitutional security" for both management and labor provides the "foundation to build a more effective, consistent, and long-range mode of doing business on both sides." Nat'l Acads. of Sci., Eng'g & Med., *supra*, at 21; *see also id.* at A-5 ("weak and fragmented" unions offer "more disadvantages" than advantages for management); Kochan et al., *supra*, at 17 (labor-management partnerships tend to develop where unions are "strong"); Reynolds, *supra*, at 444 (once union is secure, "time of union officials" can "be put to constructive use in ironing out personnel problems . . . and cooperating with management in other ways").

Fair share fees also help solve a second problem that plagues insecure unions and interferes with labor-management cooperation: conflict among coworkers. The workforce-participation programs at the heart of most labor-management cooperation depend not only on the ability of labor and management to work together but also (as is true of many other productivity-enhancing practices) on the ability of employees to work as a team. *See, e.g.*, Leape Inst., *supra*, at 15 (describing "[m]ultidisciplinary teamwork" as essential for quality improvement in healthcare); Gittell, *Healthcare*, *supra*, at 1–56 (documenting quality and efficiency performance outcomes associated with relational coordination among coworkers). When unions cannot collect fees for their

services, however, "ill feeling" tends to develop within the workforce as employees who pay union dues grow to resent those who benefit from the union's work but refuse to contribute financially. *See* Reynolds, *supra*, at 444; *cf.* Olson, *supra*, at 70–71. These natural and "powerful" reactions drive those who pay to "punish[] free riders," Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 Am. Econ. Rev. 980, 980 (2000)—a dynamic that makes effective teamwork nearly impossible. Fair share fee policies avoid these reactions by ensuring that all employees who benefit from the union's services pay their part.

### B. Fair Share Fees Provide the Time and Resources Needed for Productive Cooperation between Labor and Management.

Fair share fees are important to productive collective bargaining for the additional reason that they give unions the time and resources they need to focus on the workforce's long-term interests in mutually beneficial relationships with management.

Management experts who have studied labor-management cooperation agree that positive movement along the labor relations continuum takes time. "Hostilities and distrust" built up over years do not disappear overnight. Kochan et al., *supra*, at 71. Both labor and management benefit from time to re-adjust their relationships, explore ideas, and develop trust. *See* Kochan, *Kaiser 2009-2013*, *supra*, at 8, 13, 24.

Partnership efforts also tend to expand and generate more gains over time, after labor and manage-

ment realize benefits from initial projects. *See* Marschall & Scully-Russ, *supra*, at 215 (explaining that "early joint programs" typically "respond to a specific event or problem" before expanding); Nicole Moore, LA DHS, *The Care Improvement Teams Program Binder: How To Start a Partnership-Based Improvement Program* 24–25 (Feb. 1, 2016) (advising leaders to "start small" and "consider expansion as team establishes success"), http://img.seiu.org/docs/HowToStartAPartnership-BasedImprovement Program.pdf; *cf.* The Dunlop Comm'n on the Future of Worker-Management Relations, Fact Finding Report 46 (May 1994) ("[W]orkplace innovations that remain in place over an extended period of time . . . produce the most improvements in economic performance."). In New York, for example, partnership developed gradually between SEIU's Doctors Council and NYC H+H, and their cooperative work is still expanding today. Labor and management developed a new forum for partnership, Collaboration Councils, as recently as 2015. *See* NYC H+H & Doctors Council, *Collaboration Councils Agreement*, http://www.doctorscouncil.org/wp-content/uploads/2015/10/HHC-Doctors-Council-SEIU-Collaboration-Councils-Contract-Language.pdf (last visited Jan. 15, 2018).

Commitment of resources and staff time to partnership work on a day-to-day basis is another important pre-condition for successful labor-management cooperation. Unions and executives must be seen as investing in partnership in order to overcome rank-and-file skepticism. *See* Kochan et al., *supra*, at 154, 193 (cooperative work must overcome common "first inclination" that partnership is just "the

latest 'program of the month'"). For labor, this means re-allocating staff time to partnership activities and, in many cases, hiring new staff or consultants dedicated solely to partnership work. *See* Kochan et al., *supra*, at 82, 138 (partnership coalition of Kaiser unions employed twenty staff members by 2005); Nat'l Acads. of Sci., Eng'g & Med., *supra*, at 15 (some labor and management representatives experienced with partnership recommend hiring "a professional facilitator"). These staff are needed for education and training, among other things, as union members must often acquire "new skills . . . [in order to] engage with management" in a productive manner. Kochan et al., *supra*, at 138; *see also* Maimonides Med. Ctr. et al., *Strategic Alliance Report 2007: Creating Competitive Advantage in a Changing Healthcare Environment Through Worker Participation* 4 (2007), http://www.ilr.cornell.edu/sites/ilr.cornell.edu/files/Maimonides%20Report.pdf ("It was recognized early on that . . . success would depend on participant training, leadership development, and staff support[.]").

Fair share fees provide the stability and financial security that unions need to make these time and resource commitments—and to make them worthwhile. Only when a union is stable and financially secure will its leaders have enough confidence in the future to invest in long-term projects and be willing to devote significant energy and "staff capacity" to "engaging in union-management partnership." Roelans Email, *supra*; *see also* Reynolds, *supra*, at 444. Unions operating in right-to-work environments do not have these luxuries and are instead "forced to focus their time and resources on activi-

ties that are explicitly 'union building.'" Lazes et al., *supra*, at iii.

The experience of SEIU's Committee of Interns and Residents ("CIR") illustrates this experience. CIR represents intern, resident, and fellow physicians in six states, including New York, which permits fair share fees, and Florida, which does not. The inability to collect fair share fees in Florida compels CIR's staff members there to spend most of their time working to sign up new members. *See* Roelans Email, *supra* (because Florida is right-to-work state, "[o]ver half of my time is spent on new member recruitment," which takes away from partnership work).

In New York, by contrast, the stability provided by fair share fees has allowed CIR to invest in labor-management cooperative work with NYC H+H. In 2015, for example, NYC H+H and CIR launched Quality Improvement Clinics, which identify areas for improvement and allow residents to develop and lead quality improvement projects. *See PEI Launches QI Clinic*, The CIR Policy & Educ. Initiative (Jan. 29, 2015), http://www.cirpei.org/pei-launches-qi-clinic.html. CIR supports the program by, inter alia, employing a Quality Improvement ("QI") Director and other QI staff. A similar initiative with private-sector New York employers recently led to process changes related to post-discharge care that successfully reduced readmission rates from 23% to 11%. *See* Ebenezer Oni MD MPH, *A Resident Led Multidisciplinary Approach to Improve Continuity of Care and Readmission Rates: A Quality Improvement Project* 13, 21 (June 9, 2017), http://www.cirseiu.org/wp-content/uploads/2017/12/TOC-slides_AAMC-Presentation_Chicago.pdf.

### C. Fair Share Fees Give Unions the Strength They Need To Vouch For Cooperative Work.

Finally, fair share fees are important to productive collective bargaining because they create unions that are sufficiently resourced to build up credibility with the workforce and then "vouch for" the fairness of employer systems, including cooperative projects.

Employees' fears about engaging openly and honestly in quality improvement projects are a significant obstacle to successful labor-management cooperation. Research shows that many employees are reluctant to participate because they fear that management will not take their ideas seriously, will not follow through, will retaliate against them for expressing concerns, or will otherwise use information they provide against them. *See, e.g.*, The Dunlop Comm'n, *supra*, at 49; Avgar et al., *supra*, at 586 (cooperation often seen as "risky"). Unless these fears are assuaged, employees do not feel "safe" and "effective" in alerting management to problems or voicing ideas for improvement. Avgar et al., *supra*, at 586; *see also* The Dunlop Comm'n, *supra*, at 49 ("Workers must trust management to use the fruits of worker participation to benefit employees as well as shareholders."). Especially in healthcare, quality improvement depends on the creation of a "just culture," Am. Coll. of Healthcare Execs. & Lucien Leape Inst., *Leading a Culture of Safety: A Blueprint for Success* 21–24 (2017), in which front-line employees can speak up "without threat of negative repercussion," Leape Inst., *supra*, at 15.

One of employers' few proven strategies for overcoming workforce skepticism is to partner with unions that are stable and well-respected enough to legitimate cooperation in the eyes of the workforce. If a union that employees see as an independent and effective advocate commits to labor-management partnership, the union's commitment "vouches for" cooperation and reassures employees that participating will be safe and effective. *See, e.g.*, Avgar et al., *supra*, at 586. Put another way, employees' unions must be "regarded as strong" so that management can "be confident union leaders [have] credibility among union members" and can "effectively communicate" about partnership with the rank and file. Nat'l Acads. of Sci., Eng'g & Med., *supra*, at 18.; *see also* Gittell, *Southwest*, *supra*, at 166–67 ("Union representation within an organization can give that organization increased legitimacy with its employees, and thus serve as a key element of a system of coordination and control *if employee representatives are respected*. . . .") (emphasis added, footnote omitted).

If a union or other employee representative is seen as weak, by contrast, a partnership with that representative is unlikely to have credibility with the workforce, which may significantly reduce its ability to generate meaningful benefits for the employer. Indeed, this is one of the principal reasons why many employer-sponsored "representation plans" have failed. *See, e.g.*, Irving Bernstein, *The Lean Years* 163, 173 (1969) (describing plans that failed because worker representatives appeared "timid" or focused on "curry[ing] favor with management"); *see also* Gittell, *Southwest*, *supra*, at 172–73 (describing how most Continental Airlines employees became dissat-

isfied with management-created employee interest groups). Absent a "strong union," front-line workers do not have the confidence "to voice . . . criticism" or take other risks that are critical to the success of cooperative efforts. Elbridge S. Puckett, *Productivity Achievements—A Measure of Success*, *in The Scanlon Plan: A Frontier in Labor-Management Cooperation* 114 (Frederick G. Lesieur ed., 1958).

For all these reasons, reasonable public employers seeking the benefits of productive collective bargaining may well conclude that a "secure" union, Reynolds, *supra*, at 444, is likely to be a better partner than a "weak or fragmented one," Nat'l Acads. of Sci., Eng'g & Med., *supra*, at A-4—and that requiring fair share fees is, therefore, in their interests as employers, especially in pro-union environments where alternative policies aimed at weakening unions are unlikely to succeed and could carry high costs.

## III. Amici's Cooperative Work Shows How Collective Bargaining Relationships Supported by Fair Share Fees Can Benefit Employers and Consumers.

NYC H+H and LA DHS are the two largest municipal healthcare systems in the country, with 1.6 million patients per year and tens of thousands of employees. Both systems have successfully sought to leverage the strength of their fee-supported employees' unions by investing in cooperative labor relations programs, which have generated significant productivity, efficiency, and quality gains.

Recent partnership efforts in Los Angeles were prompted by an urgent need to respond to greater

competition under the Affordable Care Act. *See, e.g.*, Mitch Katz MD, *A Message from the Director*, LMTC News 1, Nov. 21, 2017, *available at* http://img.seiu.org/docs/20171121-LMTCNews.pdf. The partnership "started small" when LA DHS and SEIU Local 721 worked together to educate housekeeping staff about being more efficient and using fewer toxic chemicals, a collaboration that increased LAC+USC Medical Center's score on the "cleanliness" measure of a leading patient-satisfaction survey from 49% to 86%. *See* Laura Chenven & Danielle Copeland, *Front-Line Worker Engagement: Greening Health Care, Improving Worker and Patient Health, and Building Better Jobs*, 23 New Solutions 327 (Jan. 2013), *abstract available* at http://www.ncbi.nlm.nih.gov/pubmed/23896075.

Following that initial success, LA DHS expanded its reliance on union-management collaborative work and formalized its partnership with its employees' unions in a Labor Management Transformation Council. The Council has spearheaded a range of joint initiatives from a project to provide services to residents affected by a hazardous materials release, to home visits for free blood lead screenings, to a recent contest for staff to design the logo and motto for the County's new Health Agency. *See Labor Management Transformation Council Stronger Together!*, LMTC News, *supra*, at 1–2, Nov. 21, 2017 [hereinafter *LMTC Stronger Together*].

At the clinic level, LA DHS has consciously followed Kaiser's private-sector model by implementing a system of joint, labor-management care improvement teams ("CITs"), starting with a few in 2011 and

expanding the program to fifty CITs by 2016. Interview with Nicole Moore, Director, Care Improvement Teams, L.A. Cnty. Health Agency, in L.A., Cal. (Oct. 30, 2017). CITs meet on a weekly basis to plan and implement quality improvement projects and have achieved measurable quality and efficiency gains. One gastroenterology CIT developed a three-month program focused on improving patient follow-up that reduced appointment "no shows" by 18%. *See LMTC Stronger Together*, *supra*. Others have increased productivity, reduced pediatric-patient wait times, and eliminated missed and unreturned calls at an eye clinic. *See id.*; Brian Yoshio Laing MD MPH et al., *A Quasi-Experimental Evaluation of Performance Improvement Teams in the Safety-Net: A Labor-Management Partnership Model for Engaging Frontline Staff*, J. Pub. Health Mgmt. & Prac., table 3 (July-Aug. 2016), *abstract available at* https://www.ncbi.nlm.nih.gov/pubmed/26193049 (UCLA study of CITs); *Improving Care, Lowering Costs*, SEIU 6 (2015), https://action.seiu.org/page/-/HospitalQuality.pdf. Through partnership, DHS has also been able to standardize emergency codes across all its facilities—after three top-down management efforts to do the same failed. *See* Katz, *supra*.

SEIU Local 721 gives the CIT program credibility with frontline staff, and the union has contributed to the program by dedicating staff time and financial resources and by conducting union-member surveys to surface quality improvement ideas and encourage employees to invest in collaborative work. *See* Laing et al., *supra*, at 2; Interview with Patricia Castillo, L.A. Cnty. Reg'l Health Dir., SEIU 721, in L.A., Cal. (Sept. 10, 2015). Union involvement has succeeded

in inducing union members to alert management to improvement projects that the healthcare system would likely not develop on its own, as when CIR members recently proposed and received funding to purchase a laser system for patients with dark skin tones who suffer from certain dermatologic disorders. CIR members had noticed in day-to-day operation that their prior machine did not work well on dark skin. The new laser system, among other things, more effectively removes gang tattoos for patients seeking to renounce their affiliation. Email from Ralph DeRosa, Gen. Counsel, CIR (Dec. 6, 2017) (on file with authors). Partnership has also improved employee morale and commitment, as demonstrated by the fact that the DHS facility with the most CITs recorded a 95% completion rate on a recent employee-engagement survey, compared to only 45% for the system as a whole. Moore Interview, *supra*; *cf.* Laing et al., *supra*, at 3 (finding that CIT program increases "adaptive reserve," defined as a clinic's ability to make and sustain change).

Most recently, LA DHS and its employees' unions have partnered on a new initiative to foster a "just culture" within the healthcare system, as recommended by the American College of Healthcare Executives. Labor and management are working together to train the entire workforce and, through their partnership structure, have achieved remarkable alignment on goals for the project. In one recent joint video prepared to educate staff, a management representative explained LA DHS's goal as ensuring that "individuals feel free to have new ideas, to make mistakes, to not be fearful of retaliation." The management representative was followed al-

most immediately by a union member who similarly described the project as helping "us to get rid of problems before they become big ones" rather than just "sweeping problems under the rug." *See The LA County Health Agency Introduces Just Culture*, YouTube (Sept. 12, 2017), https://www.youtube.com/watch?v=7jc4TOSrJCU&t=27s.

In New York, NYC H+H and its employees' unions have developed similarly sophisticated labor-management programs, including the Quality Improvement Clinics discussed above. Partnering with labor gives these quality improvement efforts workforce credibility and encourages frank employee participation, as NYC H+H recognized and sought to benefit from in connection with a staff safety culture survey. A team of union and management representatives drafted the survey, which was used to evaluate residents' perceptions of safety culture, to identify ways to make patient-safety training more robust, and to "[a]lign labor and management goals on patient safety." Mei Kong RN et al., *An Assessment of Housestaff Experience of Safety Culture: What the Residents Revealed*, http://www.cirseiu.org/wp-content/uploads/2018/01/NPSF-poster-1024x680.jpg (last visited Jan. 15, 2018). Because the labor-management survey team understood that involving CIR would maximize participation, the team had the survey distributed by union members and staff and also enlisted union staff to publicize the survey and visit departments to collect completed survey forms. *Id.*

NYC H+H frequently partners with the physician members of SEIU's Doctors Council as well. Because of NYC H+H and the Doctors Council's shared belief

that "input [from] frontline clinicians into decision-making is essential" and that "[h]igh clinician engagement" and "professional satisfaction" improve patient care, the health care system and the doctors' union agreed in 2015 to form Collaboration Councils to conduct quality improvement projects and identify needed educational programs. NYC H+H & Doctors Council, *Collaboration Councils Agreement*, *supra*, at 4–8. One recent Collaboration Council project focused on reducing patient wait times in radiology, thereby improving patient experience and worker morale. Union members gathered data about the department's process for patient intake and about actual patient experiences. The team then implemented a new process that significantly improved the department's wait-time scores on a patient-satisfaction survey. *See* Menachem Gold MD et al., *Improving Patient Wait Time Satisfaction in Radiology*, http://www.doctorscouncil.org/wp-content/uploads/2018/01/FBCC-Radiology-Project.pdf (last visited Jan. 15, 2018).

All these cooperative projects, developed through stable collective bargaining relationships, depend on a collaborative environment, union resources, and union credibility with the workforce—conditions incompatible with union insecurity. These projects have produced significant, measurable benefits for patients, and amici urge the Court to re-affirm *Abood* so that they may continue.

## CONCLUSION

The Seventh Circuit's decision should be affirmed.

Respectfully submitted,

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